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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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COMMISSIONERS:
KRISTIN K. MAYES, Chairman
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BOB STUMP

In the matter of:

MARK W. BOSWORTH and LISA A. BOSWORTH, husband and wife;

STEPHEN G. VAN CAMPEN and DIANE V. VAN CAMPEN, husband and wife;

MICHAEL J. SARGENT and PEGGY L. SARGENT, husband and wife;

ROBERT BORNHOLDT and JANE DOE BORNHOLDT, husband and wife;

MARK BOSWORTH & ASSOCIATES, LLC, an Arizona limited liability company;

3 GRINGOS MEXICAN INVESTMENTS, LLC, an Arizona limited liability company;

Respondents.

Docket No. S-20600A-08-0340

RESPONDENTS MICHAEL J. SARGENT AND PEGGY L. SARGENT'S

REPLY IN SUPPORT OF MOTION TO QUASH ADMINISTRATIVE SUBPOENA ISSUED TO MICHAEL J. SARGENT

Arizona Corporation Commission
DOCKETED
JUN 22 2010
DOCKETED BY

Respondents Michael J. Sargent ("Mr. Sargent") and Peggy L. Sargent (collectively, the "Sargents") respectfully reply in support of their motion to quash the Administrative Subpoena issued to Michael J. Sargent on June 9, 2010.

The subpoena should be quashed because: (1) the subpoena was issued far too late, and prejudices the ability of Mr. Sargent to prepare for testimony; (2) the Division failed to provide the required witness fee; and (3) the required subpoena application is insufficient. Notably, the Response filed by the Securities Division does **not** assert that: (1) it advised Respondent's counsel of the date it intended to call Mr. Sargent as a witness, prior to June 9, 2010; (2) it provided the witness fee; or (3) its subpoena application is sufficient under A.A.C. R14-3-109(O).

I. This belated subpoena prejudices Mr. Sargent's defense.

The June 9, 2010 subpoena is "unreasonable or oppressive" (A.A.C. R14-3-109(O))

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because it was issued after the hearing began on Wednesday, June 9, 2010. The motion cites *Sam v. State,* 33 Ariz. 383, 412-413, 265 P. 609, 619 (1928) and *Parkinson v. Farmers Insurance Co.,* 122 Ariz. 343, 344, 596 P.2d 1039, 1040 (Ct. App. 1979), to demonstrate that subpoenas issued after the start of trial are unreasonable and should be quashed, absent good cause shown by the party issuing the subpoena. Given the extreme lateness of the subpoena, it is presumptively invalid under *Sam* and *Parkinson*, and the Division bears the burden of proving good cause. The Division attempts to distinguish those cases as involving third-party subpoenas[1]; but the cases do not make that distinction. No special rule exempts witnesses who are parties from the protections afforded to every witness to be spared unreasonable or oppressive subpoenas.

The Division complains that the motion does not explain how the subpoena's extreme lateness is "unreasonable or oppressive." But extremely late subpoenas are presumed unreasonable; it is up to the Division to show good cause. Even if that were not the case, a late subpoena to a witness who is a party is unreasonable because it disrupts the defense and forces a rushed attempt to prepare the witness. The Division is putting on a lengthy and complex case, calling many witnesses, most of whom have had little or no contact with Mr. Sargent. Indeed, each investor witness to testify so far has testified that Mr. Sargent did not sell them anything. Thus, the defense has been forced to prepare for numerous irrelevant, or at best, tangentially relevant, witnesses. Adding the burden of preparing for Mr. Sargent's testimony, on top of these existing burdens, is unreasonable. The Division is well aware that Mr. Sargent has very limited resources for funding his defense; this additional burden threatens to "bleed the defense dry."

The Division states that "Sargent has undoubtedly been assisting his attorneys in preparation for the administrative hearing."[2] But assisting counsel in preparing for other witnesses is very different from preparing to personally testify as a witness. Such preparation would require, at a minimum: (1) Mr. Sargent closely reviewing the Division's voluminous exhibits, in case the Division asks questions about any of them; (2) discussions with counsel on

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[1] Division Response dated June 21, 2010 at page 2, footnote 2.

[2] Division Response at 4:3-4.

the techniques of testifying as a witness; (3) practice sessions; and (4) most importantly, discussions with counsel, and criminal counsel, regarding whether to assert the privilege against self-incrimination under the United States and Arizona Constitutions, including related research, given the pending Arizona Attorney General investigation. None of these activities are involved in simply assisting counsel in preparation for the cross-examination of other witnesses. If the subpoena is not quashed, Mr. Sargent and his defense team must take all of these steps, at the last minute, with little time to prepare.

The Division points to its February 23, 2009 subpoena as providing notice to Mr. Sargent. But, as the Division acknowledges, the February subpoena was quashed.[3] Mr. Sargent had no obligation to comply with an invalid subpoena. Moreover, the February subpoena commanded Mr. Sargent to testify on March 15, 2010.[4] It did not contain the usual language about "or any subsequent days the hearing is continued..." After March 15th passed without his being called, Mr. Sargent was not on notice that he was to be called at some unspecified date in June 2010. The Division never provided any specific date in June, until it served the subpoena.

If the February subpoena had been valid, typically, one would expect the Division to contact Mr. Sargent's counsel to indicate the date they expected to call Mr. Sargent. That would alert defense counsel: (1) to the existence of the February subpoena; (2) that the Division, in fact, intended to call Mr. Sargent; (3) that the validity of the February subpoena would be at issue; and (4) that Mr. Sargent would need to be prepped to testify, if the subpoena was not quashed (as in fact, it was). The Division did not provide such notice. Indeed, on Friday, June 4, 2010, the Division telephonically provided Mr. Sargent's counsel with the order of witnesses the Division intended to call – and Mr. Sargent was not included.

A witness cannot be prepared to testify in a significant matter "on the drop of a hat." Here, Mr. Sargent's ability to adequately prepare as a witness is compromised by the extreme tardiness of the June subpoena. The Division isn't asking Mr. Sargent to testify about a traffic accident or

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[3] Division Response at 3:10.

[4] Division Response at Exhibit A, page 1.

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some other simple matter. In its opening statement, the Division asked for more than $4 million in restitution. This case involves a large number of documents including the Division's voluminous exhibits. Moreover, based on the witnesses called so far, the Division apparently believes that Mr. Sargent is responsible for every single investor – even those he never met, or those he only met many months after they invested. Thus, Mr. Sargent would require significant time to prepare, if he is forced to testify and answer the Division's questions.

The Division must also contend with the fact that its subpoena was issued more than a month after the Division objected to Mr. Bosworth's subpoenas as being untimely. The ALJ agreed, and quashed Bosworth's requested subpoenas as untimely. The Division argues that Bosworth's subpoenas are different, because they are "discovery requests pursuant to A.R.S. § 41-1062."[5] But Bosworth's subpoenas were requested under A.A.C. R14-3-109(O), the same rule that the Division invokes to issue its June subpoena. The Division recognized this when it filed its objections and motion to quash Bosworth's subpoenas – the Division specifically referred to the requirements of A.A.C. R14-3-109(O) as governing the Bosworth subpoenas.[6] There is simply no explanation as to how Bosworth's subpoenas could be too late, and the Division's month-later subpoena could be timely.

The same goes for the Sargents' May 3, 2010 Requests for Admissions and Interrogatories to the Division. The Sargents' discovery requests were expressly issued under the Commission's procedural rules, and the Rules of Civil Procedure (as incorporated in the Commission's rules). These requests were quashed as untimely. But if the Sargents' May 3rd discovery was untimely, how can the Division's June 9th subpoena be timely?

In sum, the Division's June 9th subpoena is too late, and is presumed unreasonable. Even without a presumption, the subpoena is unreasonable because of the additional burden it places on

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[5] Division Response at 4:10-11.

[6] Division "Objection to and Motion to Quash Respondent Bosworth's Request for Issuance of Administrative Subpoenas for Documents" at 4:22-25.

the defense at this late date, and because of the extensive preparation Mr. Sargent would need to testify.

II. The statutory witness fees were not provided.

The Sargents' motion to quash explained that subpoenas must be served with required witness fees, and that the failure to do so renders the subpoena invalid. The Division's response does not dispute these points; nor does it assert that the Division paid the witness fees. Instead, the Division argues that it is not required to pay witness fees under Rule 45(b)(2) of the Arizona Rules of Civil Procedure. The Division's argument is surprising, given that it has vociferously argued that the rules of civil procedure don't apply in Commission proceedings.[7] The Division cannot have it both ways. Either the Division must state on the record, once and for all, that it is bound by the Rules of Civil Procedure and will comply with them, or it should not be allowed to invoke them here.

III. The subpoena application is insufficient.

The Sargents' motion to quash quoted the Division's May 10th statement of the requirements for subpoena applications:

> Rule 14-3-109(O) provides that ...[a] request for issuance of the Subpoenas must be supported by an "application" submitted to the administrative law judge and Rule 14-3-106(F) states that the application "shall contain the facts upon which the application is based, with such exhibits as may be required or deemed appropriate by the applicant."[8]

The motion goes on to argue that the Division's one-sentence subpoena application does not come close to meeting this standard. The Division does not even attempt to argue that its perfunctory subpoena application meets this standard. Instead, it argues that subpoena applications are not "formal documents" as defined by Commission rules, and thus do not need to be docketed. Even

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[7] See e.g. Division "Objection to and Motion to Quash Respondent Bosworth's Request for Issuance of Administrative Subpoenas for Documents" (May 10, 2010) at 2: Division "Objection to and Motion to Quash Respondents Michael J. Sargent and Peggy L. Sargent's First Request for Admissions and Non-Uniform Interrogatories" (May 18, 2010) at 2, 6.

[8] Division "Objection to and Motion to Quash Respondent Bosworth's Request for Issuance of Administrative Subpoenas for Documents" at 4:22-25.

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if the Division is correct, it still has not met the subpoena application standard, as expressed in its own May 10th filing. The Division's application consists of the following sentence: "The Securities Division of the Arizona Corporation Commission requests the issuance of a subpoena to MICHAEL J. SARGENT in connection with the Administrative Hearing in the above-captioned action." The application does not contain any facts; certainly not the "facts upon which the application is based," as the Division itself says is required.

The Division's response does not – and cannot – argue that it meets subpoena application standard in the Commission's procedural rules. In a footnote, the Division refers investigatory subpoenas and states that the Commission's procedural rules do not apply to investigatory subpoenas.[9] But the June 9th subpoena is not an investigative subpoena. Indeed, the subpoena itself refers to the procedural rule for subpoenas, and the Division's subpoena application states "[t]his application is made pursuant to A.A.C. Rule R14-3-109." Moreover, the subpoena commands testimony at a Commission hearing, conducted under the procedural rules, not an investigation.

In short, the Commission's procedural rules apply to the June 9th subpoena, and they require a subpoena application to state the facts upon which the application is based. The Division enforces this standard against others; it must comply with the same rules. It has failed to do so, and thus the subpoena must be quashed.

IV. Conclusion.

The subpoena to Mr. Sargent should be quashed. The subpoena is untimely, and thus presumptively unreasonable, and even without a presumption, the lateness of the subpoena unreasonably impairs Mr. Sargent's ability to adequately prepare to testify. Moreover, the Division seeks to evade the required witness fees by pointing to the Rules of Civil Procedure – the same rules it claims time and time again do not apply to Commission proceedings. Lastly, the subpoena application is insufficient, under the standard the Division itself articulated on

[9] Division Response at page 6, footnote 10.

May 10th.

RESPECTFULLY SUBMITTED this 22nd day of June, 2010.

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